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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re FRANCISCO M. et al., Persons Coming
Under the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

TONI M.,

Defendant and Appellant.

F041859

(Super. Ct. No. 504861 & 504862)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael H. Krausnick, County Counsel, and Carrie Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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Toni M. appeals from orders terminating her parental rights (Welf. & Inst. Code, § 366.26) to her son, Francisco, and daughter, Phylcia.¹ Appellant contends the court

* Before Vartabedian, Acting P.J., Levy, J., and Cornell, J.

erred by denying her *Marsden* motion, brought at the outset of the termination hearing.² On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

At the time of Phylicia's birth in October 2001, she and appellant tested positive for marijuana and methamphetamine. Appellant also tested positive for marijuana when she gave birth in 1988 and 1994. As of the time of the 1994 birth, appellant admitted to a five to seven year history of drug abuse. Because appellant's extensive history of substance abuse seriously interfered with her ability to provide safe and appropriate care for her children (§ 300, subd. (b)), respondent Stanislaus County Community Services Agency (the Agency) initiated dependency proceedings as to then four-year-old Francisco and infant Phylicia. In December 2001, the Stanislaus County Superior Court adjudged the two children juvenile dependents of the court and removed them from appellant's custody.

Despite appellant's failure to reunify with the child born in 1994, whom a court adjudged a dependent, the court at the December 2001 dispositional hearing ordered six months of reunification services for appellant. Notably, the court made a special effort to impress upon appellant that she had only six months to complete the reunification and if she failed, the court would select a permanent plan, most likely adoption. To this end after so instructing appellant, the court asked her: "Mrs. M[.], what happens if you don't reunify with your children in the next six months?" Appellant responded "They could be adopted." She then inquired about whether her children could be placed with her in her treatment program. The court stressed the importance of making significant progress in treatment before the children could stay with appellant.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² *People v. Marsden* (1970) 2 Cal.3d 118.

Nevertheless, appellant failed to reunify with Francisco and Phylicia. Following a two-day evidentiary hearing, the court terminated services and set a section 366.26 hearing to select and implement a permanent plan for the children (setting order).

Appellant thereafter filed a notice of intent to pursue extraordinary review of the juvenile court's setting order. However, counsel on behalf of appellant, advised this court that she would not be filing a writ. She asked this court to independently review the record (*In re Sade C.* (1996) 13 Cal.4th 952, 981-983) or, in the alternative, give appellant the opportunity to file on her own behalf a writ petition. While we rejected counsel's request for independent review, we did extend time for appellant to personally file a writ petition. Because appellant did not file a writ petition, we dismissed the writ proceedings as abandoned.³

In anticipation of the section 366.26 hearing, the Agency prepared an assessment recommending that the court find the children adoptable and terminate parental rights. Then, at the start of the hearing, appellant asked for new counsel. She claimed "they're no longer representing me. They haven't done nothing to help me, nothing to even to help me." By "they," appellant was apparently referring to the public defender's office which had been appointed to represent her. Appellant's request led the court to conduct an in camera *Marsden* proceeding which is the subject of this appeal. The court thereafter denied appellant relief, proceeded with the section 366.26 hearing and ultimately terminated appellant's parental rights.

DISCUSSION

³ Pursuant to this court's order of May 13, 2003, we have taken judicial notice of portions of our file in *Toni M. v. Superior Court*, F040883, explaining this sequence of events.

Appellant contends she made a case for ineffective assistance of counsel in her *Marsden* motion, which her trial attorney did not refute, thereby entitling her to relief. According to appellant, she established her trial counsel failed to communicate with and adequately represent her as well as interfered with her reunification efforts. We disagree.

A parent, seeking review of an order denying a *Marsden* motion based on inadequate representation, must show that: counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law and counsel's omission was prejudicial. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668; citing *People v. Pope* (1979) 23 Cal.3d 412, 425 & *People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Here, as discussed below, appellant failed to establish either prong in the juvenile court. On appeal, she reads too much into her own statements. In addition, appellant thoroughly ignores her failure to show any resulting prejudice.

Appellant first contends she established her trial counsel failed to communicate with her prior to the section 366.26 hearing. However, that was not her testimony at the *Marsden* hearing. Rather, appellant charged that she "could never get ahold of nobody." When the court asked her for specifics, appellant reported she made six telephone calls to the public defender's office. Two times appellant left a message with a receptionist who said "they will get back to [her]" but no one returned those two messages. The four other calls went through to an answering machine. Notably, though, appellant would "just hang up, because [she] was tired of getting the answering machine." Such evidence hardly establishes a failure to communicate on counsel's part, let alone that counsel improperly failed to consult with her prior to the section 366.26 hearing. In addition, appellant admitted her counsel previously told her to call and make an appointment. Nevertheless, appellant did not testify that she ever tried to make an appointment.

Neither did appellant establish that her counsel failed to adequately represent her. What appellant first told the court was "[h]alf the things the social worker wrote in the

report ain't even true. He didn't try to verify anything." Counsel "could have represented [her] better . . . [b]y finding out the facts." Because appellant's complaint in this regard was nothing more than conclusion, the court asked her for a specific example. Appellant replied "when they wrote the case about a drug pipe in my shoes." This was apparently in reference to a statement contained in the original detention report. After the Agency placed the children in protective custody, the mother provided the relative caretaker with clothing for the children. Then, according to the detention report, "[a] drug pipe was found inside one of the shoes." Given the mother's undisputed and extensive history of substance abuse and criminal history for drug related offenses, any dispute over the ownership of a drug pipe was superfluous at best and therefore not prejudicial to her cause. In light of appellant's failure to cite a specific example of counsel not investigating an Agency claim which could have been prejudicial to her, we conclude the court properly handled this aspect of appellant's *Marsden* motion and did not err.

Appellant also questioned the fitness of the paternal grandmother with whom the children had been placed since April 2002. "His mother is a codeine freak and she was having a nervous breakdown before my kids got taken. Before I had my daughter she didn't want nothing to do with my kids." However, it is unclear from the record whether she blamed her counsel or the Agency for this. In this regard, appellant stated: "I mean we tried to get them placed with [*sic*] mutual person where we both could see them. They wouldn't even look into that." In any event, appellant failed to make any showing of how she was prejudiced by the children's relative placement.

On appeal, nevertheless, she recharacterizes her remarks as criticism that the paternal grandmother was insincere in her statements that she wanted to adopt the children and that this was something trial counsel should have investigated. On this record, we find no reason to condemn the juvenile court because it did not glean from

appellant's complaints about the paternal grandmother a challenge to counsel's representation on the issue of adoptability.

Appellant further claims she was "particularly upset" at the *Marsden* hearing that her attorney notified her that she (counsel) would not file a writ petition for her even after appellant filed the notice of intent. Even so, appellant did not make a showing that she was prejudiced by counsel's election. The records we have judicially noticed indeed show that counsel requested this court's independent review pursuant to *In re Sade C.*, *supra*, 13 Cal.4th at pp. 981-983. By asking for independent review, counsel was essentially advising this court that she had found no arguable issues. (*Ibid.*) Notably, however, appellant never claimed she had a viable issue to raise in the writ proceeding. Further, counsel requested and we extended time for appellant to file her own petition. Appellant, however, never took this court up on its offer. Thus, appellant is in no position to argue that counsel's decision not to file a writ petition amounted to ineffectiveness.

Finally, in her briefing to this court, appellant complains that her attorney contributed to her delay in accessing reunification services. Once again, however, appellant mischaracterizes the record of the *Marsden* hearing.

During the *Marsden* proceedings, appellant's deputy public defender Jared Carrillo reviewed notes in appellant's file to rebut her general claim that the public defender's office should have done something more to help her. Carrillo had taken over appellant's case following the six-month review hearing. Laura Pedicini, a deputy public defender who previously represented appellant, took maternity leave starting the day after the review hearing. In reviewing the file notes, Carrillo told the court that Pedicini repeatedly warned appellant that she had a limited time to reunify and she needed to complete her case plan. Additionally, a note dated March 26, 2002, stated that the client seemed "to genuinely believe she should only have to do her case plan if CPS is cooperating with her." Pedicini informed appellant at that point it was the other way

around, she needs to continue to do her case plan. Carrillo argued “[t]he only thing we can do is advise her of what it is she needs to do and when she has to have it completed by. What she chooses to do or how she chooses to go about it after she leaves our office is not anything that we can control.”

Appellant retorted:

“Miss Pedicini [*sic*] never told us that I had to do it right away. I had surgery problems and it took that social worker a month to tell me that I couldn’t go into a program. Nobody said nothing about that. I told Miss Pedicini [*sic*] that I – she put me off for a month. She told me to pick a program. I picked it and she goes I have to wait for my supervisor’s approval. A month and a half after the guy will come and say – for a month and a half Jeanine Trinh [a social worker] did not get back to us. Then she told us we don’t approve of that program. When I did get in a program it’s too late.”

We do not interpret the foregoing as an indictment of counsel, but rather as an attack on the Agency. At most, appellant claimed Pedicini never told her she had to do reunification “right away.” Given the conflicting evidence on this point, including the court’s own remarks at the December dispositional hearing that she had only six months to complete reunification and would need to make significant progress in treatment before the children could return to her, her claim that it was somehow Pedicini’s fault that she did not start reunification “right away” was disingenuous at best. Thus, the court could properly reject her argument in this regard.

In conclusion, the juvenile court properly conducted the *Marsden* hearing and denied appellant’s request for new counsel.

DISPOSITION

The orders terminating parental rights are affirmed.